No. 83-1946

In The
Supreme Court of the United States
October Term, 1983

WILLIAM SUNDEL,
Petitioner,

v.

JUSTICES OF THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a retrial of the petitioner barred by the Double Jeopardy Clause where the petitioner, knowing that his request for new counsel would result in a mistrial declaration by the trial judge, requested and consented to a mistrial declaration?

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported; a copy is annexed to petitioner's brief.

The opinion of the District Court in this case is not officially reported; a copy is annexed to petitioner's brief.

The opinion of the Rhode Island Supreme Court is reported at 460 A.2d 939 (1983). A copy is annexed as an Appendix.

JURISDICTION

The respondents agree with the statement of jurisdiction as it appears in the brief for the petitioner.

STATEMENT OF THE CASE

Petitioner William Sundel and three co-defendants were indicted by a Grand Jury for the County of Kent, State of Rhode Island, on October 1, 1981 (Ind. K2/81-0478, *State of Rhode Island v. Frank Nelson, William Sundel, Bonnie Hall and Michael Hall.*) The indictment charged that on August 15, 1981 in Warwick, Rhode Island, Sundel possessed marijuana with intent to deliver and conspired to possess marijuana with intent to deliver, in violation of the Rhode Island General Laws. (App. at 014).[1]

John A. O'Neill, Jr., Esq. filed an entry of appearance form for Sundel and also one for co-defendant Frank Nelson. An entry of appearance form for Sundel was also filed by David Breitbart, Esq. who was a member of the New York Bar, but not the Rhode Island Bar. (App. at 079, 080). On November 2, 1981, Mr. Breitbart filed a form

[1]References are to the Appellant's Appendix and to the Supplemental Appendix of the Appellees to the First Circuit.

entitled Motion and Entry of Appearance As Associate Trial Counsel. The Motion was assented to by Sundel and by Mr. O'Neill as Local Associate Counsel. (App. at 015). The Motion was granted by Superior Court Justice John Bourcier on January 4, 1982.

On March 30, 1982, Mr. Justice Bourcier began hearing pre-trial motions including a motion to suppress evidence which was seized from a business named Hot Tubs of Newport located in Warwick, Rhode Island, a motion to dismiss pursuant to Rhode Island Superior Court Rule of Criminal Procedure 48(a) or 48(b), and a motion for severance. On March 31, 1982, a jury was selected and sworn. Testimony by the State's witnesses began on April 1, 1982.

At the close of court on April 1, 1982 upon completion of testimony by the first witness, Rhode Island State Police Detective Corporal Edward P. Malley, Mr. Breitbart made what he termed a due process application. (App. at 107). Mr. O'Neill joined in Mr. Breitbart's motion and also moved to pass and to sever due to certain remarks made by the trial justice. (App. at 108). The trial justice reserved decision on O'Neill's motion to pass. (App. at 109).

When court resumed on April 2, 1982, the trial justice considered the motions raised the previous day and addressed all the parties. (App. at 029-043). The trial justice voiced his concern that Sundel might not be receiving the effective assistance of counsel from Mr. Breitbart. (App. at 037). The trial justice stated that Sundel had the option of continuing with Mr. Breitbart as counsel, or of having the case taken from the jury and the matter continued for Sundel to obtain other or additional counsel.

(App. at 037, 038). The trial justice expressly stated he was not *sua sponte* passing the case. (App. at 040). Mr. Breitbart then requested and was granted a recess for consultations with Sundel as to Sundel's options and the possibility of Sundel obtaining other counsel. (App. at 042, 043).

During the recess, counsel for Sundel, Nelson and the State of Rhode Island met in chambers with the trial justice. Though this chambers conference was not recorded, the record does reflect some of what transpired during the chambers conference. During this recess, but prior to the chambers conference, the trial justice received word through the court sheriff that the trial was not going to proceed and that there would be a change of counsel. It was then related to the trial justice during the chambers conference that Sundel desired other counsel in the case. (App. at 073).

When court resumed, the permission of Mr. Breitbart to appear as associate trial counsel was revoked, rescinded, and cancelled. (App. at 043, 044). Mr. O'Neill was directed to proceed in the absence of Mr. Breitbart. (App. at 044). Mr. Sundel indicated he wished to engage other counsel. The trial justice then passed Sundel's case and continued it for trial until May 24, 1982. As for Nelson, the trial justice granted his motion to pass and also continued his case to May 24, 1982 for trial. (App. at 045). Mr. Breitbart then objected to the trial justice's findings with respect to Mr. Breitbart's ability to represent Sundel effectively. (App. at 045-050).

On May 21, 1982, Sundel and Nelson moved to dismiss the indictment on the grounds that retrial was barred

by the Double Jeopardy Clause. The motions were denied by the trial justice who based his decision on the fact that Nelson had moved to pass the case and that Sundel had made a request to obtain other counsel. (App. at 077). A motion for a continuance of the trial date was also denied. (App. at 111). The Rhode Island Supreme Court stayed all proceedings on May 21, 1982. A petition for certiorari was granted on July 9, 1982 by that Court. On June 2, 1983, the Rhode Island Supreme Court denied the petition for certiorari filed by both petitioner Sundel and co-defendant Nelson, quashed the previously issued writ, and remanded the record to the Superior Court for trial. A motion for reargument was denied.

On June 7, 1983, Sundel filed a Petition for Writ of Habeas Corpus in the Federal District Court for the District of Rhode Island. On August 23, 1983, District Court Judge Bruce M. Selya denied the petition finding that Sundel "having been apprised of his options, chose to avail himself of the opportunity to secure successor counsel (well knowing that such a choice would vitiate the trial then in progress) . . . that the trial justice acted out of manifest necessity in declaring a mistrial." (App. at 012). The Judge further found that Sundel's claim that his Sixth Amendment rights were violated was moot. (App. at 013).

On February 29, 1984, the United States Court of Appeals for the First Circuit affirmed the decision of the District Court. The First Circuit found that Sundel's case was factually similar and legally indistinguishable from *United States v. Dinitz*, 424 U.S. 600 (1976).

REASONS FOR DENYING THE WRIT

I. The Considerations Governing A Review On Certiorari Are Not Present

The considerations governing review on certiorari pursuant to Rule 17 of the Rules of the Supreme Court of the United States are not present in this case. The decision of the Court of Appeals for the First Circuit does not conflict with the decision of another Circuit or Circuits. The First Circuit did not decide a federal question in such a way as to bring it into conflict with the Rhode Island Supreme Court. The Court of Appeals for the First Circuit did not depart from the boundaries of the "accepted and usual course of judicial proceedings." The First Circuit did not decide an important, but unsettled, question of federal law, nor did the First Circuit decide this case so as to conflict with the decisions of this Court. In fact, the Court of Appeals expressly relied upon *United States v. Dinitz, supra,* and found the petitioner's case to be factually similar and legally indistinguishable from the *Dinitz* case.

II. The State Of Rhode Island Is Not Barred From Retrying Petitioner William A. Sundel

It has long been recognized that the defendant has a valued right to have his trial completed by a particular tribunal, though in some instances this right might be subordinated to the public's interest in fair trials designed to end in just judgments. *Wade v. Hunter,* 336 U.S. 684 (1948). This right exists because a second prosecution generally increases the financial and emotional burden on the defendant, and it prolongs the period in which he

is stigmatized by a pending charge. *Arizona v. Washington*, 434 U.S. 497 (1978).

Though a trial judge may *sua sponte* declare a mistrial where manifest necessity so dictates, *United States v. Perez*, 9 Wheat. 165 (1824), there are different considerations where a mistrial is declared upon a motion of the defendant or with his consent. The general rule is that when a defendant moves for or consents to a mistrial, he may not thereafter successfully invoke the Double Jeopardy Clause in an attempt to bar a retrial. *Oregon v. Kennedy*, — U.S. —, 102 S.Ct. 2083 (1982); *United States v. Dinitz, supra*; *United States v. Jorn*, 400 U.S. 470 (1971). There is a limited exception to this general rule. Initially, this Court held that a defendant's motion for or consent to a mistrial did not bar a retrial except where circumstances developed which were attributable to prosecutorial overreaching. A retrial was not barred even if the defendant moved for the mistrial due to prosecutorial or judicial error. *United States v. Jorn, supra.* In *United States v. Dinitz, supra*, this Court held that the Double Jeopardy Clause protected a defendant against governmental actions intended to provoke mistrial requests, against bad faith conduct by a judge or by a prosecutor which threatened the harassment of an accused by successive prosecutions, and against the declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant.

In *Oregon v. Kennedy, supra*, this Court re-examined the effect of the Double Jeopardy Clause as to those cases in which the defendant succeeded in aborting the first trial on his own motion. In that case, this Court stated, "Only where the governmental conduct in question is intended to

'goad' the defendant into moving for a mistrial may a defendant raise the bar of Double Jeopardy to a second trial after having succeeded in aborting the first on his own motion." Thus, the "overreaching" standard was abandoned and an "intent of the prosecution" standard was adopted.

Several Courts have addressed the issue of whether prosecutorial misconduct necessitated the barring of a retrial on double jeopardy grounds even though the defendant moved for or consented to the mistrial. In *Commonwealth v. Virtu,* 432 A.2d 198 (Pa., 1981), the Court held that prosecutorial misconduct constituted overreaching where the prosecutor called to the witness stand a witness whom he knew had and would assert his Fifth Amendment privilege. The prosecutor further denied that this same witness had asserted the Fifth Amendment privilege in a previous proceeding when the witness had in fact claimed that privilege. In *United States v. Nelson,* 582 F.2d 1246 (10th Cir., 1978), the prosecutor asked a police agent a question which elicited a prejudicial response. The prosecutor volunteered that he knew in advance what the answer would be. The defendant's motion for a mistrial was granted. The Court held that the defendant had only shown prosecutorial error, not bad faith, and that a retrial was not barred by the Double Jeopardy Clause. Finally, in *Oregon v. Kennedy, supra,* this Court held that when the prosecutor called the defendant a "crook", there was no evidence that he intended to provoke the defendant into moving for a mistrial.

Other jurisdictions have addressed the issue of double jeopardy once the defendant has moved for a mistrial. In *United States v. Goldstein,* 479 F.2d 1061 (2nd Cir., 1973),

the defendants moved for a mistrial during jury deliberations on the grounds that the jury was deadlocked. The Court declared a mistrial several hours later. The defendants later moved to dismiss on double jeopardy grounds. The Court noted that apparently the defendants believed that the jury had become favorable to their position. However, the defendants did not communicate to the trial justice their desire to abandon the mistrial request. Further, the defendants remained silent after the discharge of the first jury and did not register an objection to the mistrial declaration. In *United States v. Pappas,* 445 F.2d 1194 (3rd Cir., 1971), the defendant's motion for a mistrial was denied by the trial justice. The following day, the trial justice reconsidered the motion and then granted it. The Court held that there was no bar to a retrial. In the *Pappas* case, the defendant did not move to withdraw his mistrial motion nor did he object to the mistrial declaration. Finally, in *United States v. Smith,* 621 F.2d 350 (9th Cir., 1980), a juror was unable to attend Court due to her mother's illness. There were no alternate jurors, and the defendant refused to proceed with eleven jurors. The trial justice announced he would declare a mistrial and did so. Prior to the declaration, the defendant's attorney requested that the Court instruct the jury that the defendant was not to blame for the mistrial and that the jurors were not to discuss the case because they might serve on the retrial jury. After the jury was dismissed, there was discussion about the schedule of the defense counsel as it related to the date for retrial. Some pretrial matters were also discussed. The Court stated, "These items show that defense counsel not only did not object to the order of the mistrial, but affirmatively indicated his understanding that there could and would be a

retrial. This is enough to constitute implied consent." *Id* at 352.

Sundel argues that the trial justice declared a mistrial under circumstances not amounting to manifest necessity. He claims that the mistrial resulted from improper actions by the trial justice and that a retrial would violate his protection against double jeopardy. The respondents counter that Sundel requested and consented to the declaration of a mistrial. Further, the refusal of John A. O'Neill, Jr., Esq. to continue his representation of Sundel necessitated a mistrial.

On October 15, 1981, John A. O'Neill, Jr., Esq., a member of the Rhode Island Bar, entered an appearance on behalf of William Sundel. On this same date, David Breitbart, Esq., a member of the New York Bar, also entered an appearance for Sundel. (App. at 079, 080). On November 2, 1981, a form entitled "Motion and Entry of Appearance as Associate Trial Counsel" was filed. This form named Mr. O'Neill and Mr. Breitbart as associate trial counsel. The form contained a clause stating that in the event of Mr. Breitbart's absence from any hearing or trial in the case of *State v. Sundel.* Mr. O'Neill could act for and on behalf of Mr. Breitbart in the conduct of such hearing or trial. The form was signed by Mr. Breitbart and was assented to by Mr. Sundel and by Mr. O'Neill as local associate counsel. The motion was granted by Superior Court Justice John Bourcier on January 4, 1982. (App. at 015).

On April 2, 1982, after a jury had been empaneled and sworn and after the first witness had testified, the trial justice placed on the record several reasons why he believed Mr. Breitbart was not able to effectively represent

Sundel. (App. at 029-043). The trial justice first remarked that Mr. Breitbart had failed to demonstrate that Sundel had the required standing to contest the search and seizure at the premises in Warwick, Rhode Island. (App. at 081, 033). The trial justice found that this failure by Mr. Breitbart resulted from a lack of knowledge and of understanding of Supreme Court opinions. He also said that by reading the applicable case law to Mr. Breitbart, he hoped to prompt a motion to reopen from Mr. Breitbart. (App. at 033). Such a motion was not made.

In a case decided by the Rhode Island Supreme Court prior to the trial of the case at bar, that Court held that the "burden of establishing the requisite standing to challenge the admissability of evidence seized rests squarely upon the defendant." *State v. Porter,* 437 A.2d 1368, 1371 (R.I., 1981). Mr. Breitbart offered no evidence on the standing issue. The trial justice made no finding as to Mr. O'Neill's failure to raise the standing issue.

The trial justice next remarked that certain motions filed by Mr. Breitbart were unprecedented. (App. at 032-033). A motion to dismiss pursuant to Rule 48(a) or 48(b) of the Rhode Island Superior Court Rules of Criminal Procedure was filed. Rule 48 states:

> 48. DISMISSAL.—(a) By Attorney for State. The attorney for the state may file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.
>
> (b) By Court. If there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint . . .

Rule 48(a) is expressly the perogative of the Rhode Island Attorney General. The Attorney General may dismiss a case without a motion to the Court. (App. at 114). The respondents cannot ascertain the purpose of such a motion made to the trial justice. As to that portion of the motion addressed to Rule 48(b), the trial justice denied that portion when Sundel failed to introduce any evidence in support of the motion and relied solely upon oral argument. (App. at 082). The trial justice later vacated his denial when Mr. Breitbart informed the trial justice that his failure to introduce such evidence resulted from his lack of familiarity with Rhode Island practice and his mistaken assumption that the trial justice had knowledge of certain facts, when in fact the trial justice did not have such knowledge. (App. at 083-086).

Third, the trial justice found that Mr. Breitbart was unable to conform his voir dire to Rule 24 of the Rhode Island Superior Court Rules of Criminal Procedure. (App. at 033). Rule 24 states in pertinent part:

> The examination of prospective jurors shall be for the purpose of determining whether a prospective juror is related to a party, or has any interest in the case, or has expressed or formed an opinion or is sensible of any bias or prejudice therein. (App. at 115).

During the voir dire, Mr. Breitbart characterized Michael Hall, a co-defendant who had agreed to testify as a witness for the State, as having a motivation to lie, fooling the Rhode Island State Police, and making a deal with the Rhode Island Attorney General. Mr. Breitbart first characterized a recommendation to be made to the Court by the Attorney General in the case of Michael Hall as a

"deal". (App. at 088). When an objection was made, Mr. Breitbart commented upon the possible sentencing of Michael Hall and his motivation to lie. (App. at 090). The trial justice determined that such comment was not within the spirit of the Canons of Professional Ethics, and he forbade Mr. Breitbart to question potential jurors further in that area. (App. at 090, 091). Despite this prohibition, Mr. Breitbart continued to conduct his voir dire in the area of the truthfulness of Michael Hall and his motivation to lie:

> —a comment upon Mr. Hall's motivation to testify truthfully and evaluating whether or not he knowingly and intentionally lied. (App. at 092, 093);
>
> —a comment upon the truthfulness of a witness on prior occasions affecting the worthiness of that witness. (App. at 094);
>
> —a comment upon Mr. Hall's motivation to tell the truth. (App. at 095);
>
> —a comment as to whether or not Mr. Hall was capable of testifying truthfully. (App. at 097);
>
> —a comment on Mr. Hall fooling the State Police. (App. at 098, 099);
>
> —a comment on a witness previously respecting a sworn oath. (App. at 095);
>
> —a comment to carefully scrutinize the testimony of Michael Hall. (App. at 095).

Again, during Mr. Breitbart's opening to the jury, he referred to Mr. Hall as fooling the State Police and as lying. (App. at 026-028). It is clear that all of these comments by Mr. Breitbart characterized the State's witness Michael Hall as a liar. These comments violated the letter and the spirit of the trial justice's prohibition and were done so with obvious intent. Sundel's reliance upon

State v. Anthony, 422 A.2d 921 (R.I., 1980), as authority for such a voir dire is misplaced. The *Anthony* decision does not approve of this type of questioning during the voir dire. The Rhode Island Court there held that the trial justice should afford to the *cross-examiner* an opportunity "to establish or reveal possible bias, prejudice, or ulterior motives as they may relate to the case being tried." *Id* at 924. The *Anthony* decision would grant to Sundel certain rights in the cross-examination of witnesses. It does not allow him during the voir dire to refer to a potential witness as a liar. The respondents direct this Honorable Court to Canon 7 of Rhode Island Supreme Court Rule 47 which forbids an attorney from expressing a personal opinion as to the credibility of a witness. (App. at 116-117). The respondents contend that at the point in the proceedings when these comments were made—a time when no witnesses had testified and the stage of closing arguments had not been reached—these statements by Mr. Breitbart were clearly the personal opinion of Mr. Breitbart as to the credibility of co-defendant Michael Hall. These comments also failed to provide any insight concerning a prospective juror's relation to a party, his interest, his opinion or his prejudice. (App. at 115).

The trial justice further found that certain references to a New York lawyer and a mother-in-law selecting a lawyer were meaningless and irrelevant to the voir dire. (App. at 034). Such remarks occurred several times during the proceedings. (App. at 087, 096, 101).

Finally, the trial justice found that Mr. Breitbart lacked an understanding of the scope of cross-examination. (App. at 035). Mr. Breitbart refused to accept that the extent of cross-examination was within the sound discre-

tion of the trial justice and that generally a witness could not be cross-examined on those areas not developed on direct examination. As stated in *State v. Anthony, supra*:

> The scope of cross-examination is subject to the exercise of the trial justice's sound discretion . . . It is the essence of a fair trial that reasonable latitude be given to the cross-examiner. This latitude should include an opportunity for the defendant to establish or reveal possible bias, prejudice or ulterior motives as they relate to the case being tried . . . at 924.

Mr. Breitbart did not seek to cross-examine Detective Malley on his possible bias, his prejudice, or his ulterior motives as they related to the acquisition of a search warrant, the seizure of ten tons of marijuana, the taking of test samples, or the chain of custody. In fact, during his opening statement, Mr. Breitbart had stated that the State Police officers involved, including Detective Malley, were excellent officers and had done a diligent job. (App. at 027). What Mr. Breitbart sought to do was to bring out on the cross-examination of Detective Malley the hearsay statements of Michael Hall who was to be called as a witness. He sought to show through Detective Malley that Mr. Hall had lied and made conflicting statements to the State Police. He acknowledged that his questions were beyond the scope of direct examination. But, he stated he wished to make Detective Malley his witness on cross-examination. (App. at 103, 104). Such an approach does not fall within the *Anthony* decision and is clearly improper.

After making the foregoing observations, the trial justice addressed the following remarks to Mr. Breitbart and to Sundel:

> The decision that the court has now gentleman, is to decide whether I should, *sua sponte* . . . pass this case, or permit the case to continue
>
> . . . .
>
> I am somewhat concerned as to whether I should give Mr. Sundel the option of proceeding with Mr. Breitbart or requesting that he be given permission to obtain other counsel. If he wants to do that, I would certainly entertain any requests by him made for that purpose and I would continue the matter until May 17 and take this case from the jury.
>
> . . . If Mr. Sundel continues on with present counsel, I want him to be fully aware that he is doing so willingly, intelligently, and with full knowledge as to what appears to the Court to be perfectly obvious in this case.
>
> (App. at 036-038).

The trial justice, though stating that he was considering a *sua sponte* mistrial, gave Sundel two options: 1) continue with Mr. Breitbart as counsel, or 2) request other or additional counsel. He told Sundel that if Sundel requested other or additional counsel, the case would be passed and continued to May 17, 1982 for trial. It is clear that the choice was Sundel's.

Mr. Breitbart then addressed the Court as to whether the trial judge was declaring a mistrial *sua sponte*:

> Mr. Breitbart: . . . It is my understanding at this time, so that I may inform my client, that you are not *sua sponte,* passing this case?
>
> The Court: That is correct.
>
> The Court: I am not going to *sua sponte,* although I have the authority to do so based on conduct of counsel; . . . But I take the position that I am not going to

> create any problems in this case. Under present circumstances, since you have been warned and that is one of the options that was given in the *Dinitz case*.
> . . .
>
> (App. at 040, 041).
>
> Mr. Breitbart: May we have ten minutes so that I may explain all of the legal ramifications to my client? He may want to opt for your Honor giving him an opportunity to obtain other counsel.
>
> The Court: It is his right, I am trying to protect his rights and I am prepared, if he understands everything that I have said to him, to let this trial proceed
> . . .
>
> (App. at 042, 043).

The Court then recessed. The trial justice did not *sua sponte* pass the case. Sundel understood that he had two options: continue with Mr. Breitbart or obtain other counsel. If he obtained other or additional counsel, the case would be passed and continued for trial. Mr. Breitbart informed the trial justice that he desired a recess to further discuss the options with Sundel. He even stated that Sundel might want to opt for other counsel.

During this recess, the trial justice met in his chambers with Mr. Breitbart, Mr. O'Neill, and the State Prosecutor. Though this conference was not recorded, some record of what transpired at this conference was made. On May 21, 1982, Sundel moved to dismiss the indictment on the grounds of double jeopardy. While rendering his decision on this motion to dismiss, the trial justice made reference to the chambers conference of April 2, 1982. The trial justice stated:

> After the Court indicated what it would do in open Court, Mr. Breitbart indicated that he would like an

> opportunity to discuss that matter with his client, and with co-counsel. Approximately an hour later . . . *word came to me that there was going to be a change of counsel* . . .
>
> I then requested that all counsel come in and let me know what was going to happen because we were ready to schedule the next case. Counsel did come into chambers.
>
> (App. 071).
>
> He (Mr. Breitbart) then indicated that he had spoken with Mr. Sundel and he felt that, under all of the circumstances, Mr. Sundel believed that there should be other counsel in the case. I would also add that took place as a result of the earlier statement I had made in open Court.
>
> (App. at 073).

When Court resumed, the trial justice revoked, rescinded and cancelled Mr. Breitbart's permission to appear. (App. at 043, 044). The trial justice informed Mr. O'Neill that on the record he represented both Sundel and the co-defendant Nelson. He told Mr. O'Neill that he would afford Mr. O'Neill an opportunity to discuss with Sundel and Nelson any possible conflict in representation. Mr. O'Neill declined, indicating he believed that there was a conflict. Mr. O'Neill informed the trial justice that he believed Sundel wanted to engage other counsel. This position was affirmed by Sundel. (App. at 044, 045). The trial justice then stated that in view of Sundel's request to obtain other counsel, the trial justice would grant that request, pass the case and continue it for trial to May 24, 1982. (App. at 045).

Thus, the trial transcript indicates that the trial justice did not *sua sponte* declare a mistrial, though he

acknowledged that he had that option. Rather, the trial justice gave Sundel the option of continuing the trial with Mr. Breitbart or of requesting other or additional counsel. He told Sundel that if he requested other or additional counsel, he would pass the case and continue it to May 24, 1982 for trial. It was made very clear to Sundel that a selection of the second option by him would result in a passing of the case. (App. at 036, 043). The words used by the trial justice were plain, and in fact, Mr. Breitbart acknowledged that he had fully explained the options to Sundel. It is clear that Mr. Breitbart requested a recess so that he could discuss the options with Sundel. He told the trial justice that Sundel might want to avail himself of the second option. It was during that recess, in a chambers conference, that Mr. Breitbart told the trial justice that Sundel did want other counsel. It was then that the trial justice, after returning to the Bench, revoked Mr. Breitbart's permission to appear and subsequently declared the mistrial. This was in accord with the procedure previously outlined by the trial justice. It is certainly not logical that the trial justice would declare a mistrial *sua sponte* shortly after giving Sundel the option of proceeding with Mr. Breitbart.

The respondents further argue that Attorney O'Neill agreed with the account of the chambers conference by the trial justice when the trial justice rendered his decision on the motion to dismiss on May 21, 1982. When the trial justice stated that Mr. Breitbart said that he had spoken with Sundel and that Sundel wanted other counsel, Mr. O'Neill said that the version as related by the trial justice coincided with Mr. O'Neill's own recollection. Mr. O'Neill was still representing Sundel at the time of the chambers conference. Thus, Sundel's own attorney agreed that

Sundel had chosen an option which would knowingly result in a mistrial declaration. (App. at 073).

Sundel further argues that when the trial justice rescinded the permission of Mr. Breitbart to appear, the three alternatives available to him were in fact not alternatives at all.

This argument overlooks two significant factors. First, by electing not to continue with Mr. Breitbart as counsel, Sundel requested and consented to a mistrial. Sundel had been informed that the trial justice would follow this course if Sundel made such an election. Second, Sundel was also represented by Mr. O'Neill. Mr. O'Neill's entry of appearance for Sundel filed on October 15, 1981 contained no limitation upon his authority to act. (App. at 079). Furthermore, the request to appear *pro hoc vice* filed by Mr. Breitbart and assented to by both Mr. O'Neill and Mr. Sundel clearly stated that Mr. O'Neill could act in the event of Mr. Breitbart's absence. (App. at 015). The respondents point out that Mr. O'Neill's defense at trial was as vigorous for Sundel as it was for co-defendant Nelson. The trial transcript and the briefs filed in the Rhode Island Supreme Court evidence this. Mr. O'Neill's availability as trial counsel was certainly not an "illusory" option. He had entered an appearance for Sundel. Though he had moved to sever co-defendant Nelson's case from that of Sundel's, he never moved to withdraw as local counsel for Sundel. As District Judge Selya observed, if a true conflict existed which prevented Mr. O'Neill from handling Sundel's defense alone, it also should have precluded his capacity as Sundel's local counsel. (App. at 011). Sundel still had the representation of Mr. O'Neill, an active trial attorney. It was only after

Mr. O'Neill stated that he believed a conflict existed in representing both Sundel and Nelson and after Mr. Sundel requested other counsel that the trial justice then declared the mistrial in accordance with his previously outlined position.

Sundel further argues that the trial justice overlooked other options available to him other than a mistrial declaration. Sundel suggests a continuance as a viable alternative. The respondents contend that Sundel knew in advance that his election of new counsel would result in a new trial. Additionally, petit jurors in Rhode Island serve a term of two weeks. A continuance of an extended period would have been necessary to allow new counsel to enter the case and continue with the trial. Discovery files would have had to have been reviewed, witnesses interviewed, and transcripts transcribed and reviewed. Sundel would have needed time to engage his new counsel. Such an extended continuance was simply not practical. As District Judge Selya stated, "Implicit . . . was a finding of manifest necessity." (App. 009).

Finally, in support of his argument that the trial justice *sua sponte* declared a mistrial, Sundel contends that through Mr. Breitbart, Sundel registered an objection to the declaration. However, a reading of that portion of the transcript shows that Mr. Breitbart was not registering an objection to the declaration of the mistrial. Rather, he was objecting solely to the trial justice's assessment of his professional ability. (App. at 045-050). Mr. Breitbart contended that the trial justice's assessment of his ability was error. There was extended discussion of the meaning of the term "*voir dire*". Additionally, there was no reference to the mistrial declaration during the objection. The

objection only referred to the assessment of Mr. Breitbart's ability.

Another issue to be addressed is whether the prosecutor or the trial judge intended to provoke Sundel into moving for a mistrial. As was stated in *Oregon v. Kennedy, supra*:

> We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in an effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Id.* at 2091.

In the case at bar, there is nothing on the record to indicate that the state provoked a mistrial. As for the trial justice, his conduct shows a complete impartiality during the proceedings. The State had only presented its first witness who testified solely to the seizure of the marijuana and the chain of custody of evidence. It cannot be argued that the trial justice provoked a mistrial because the State's case was going badly. See *United States v. Rich*, 589 F.2d 1025, 1028 (10th Cir., 1978). The State's case had just begun. The State had been successful on the pretrial motions. There is no suggestion the case was progressing badly for the State.

During the pretrial motions, though the trial justice had denied one motion for failure to introduce evidence, he later vacated that denial and permitted Sundel to introduce that evidence. (App. at 082-086). During the cross-examination of Detective Malley, the trial justice reversed

his previous ruling sustaining objections made by the State to questions propounded by Sundel and allowed Sundel to cross-examine Detective Malley in that particular area. (App. at 105, 106). Finally, Mr. Breitbart was never prevented from speaking during the proceedings, nor did the trial justice have him removed from the courtroom, nor did the trial justice hold him in contempt. The trial justice merely gave Sundel a choice. If Sundel had chosen to continue with Mr. Breitbart, there is no evidence that the trial justice would have taken action against Mr. Breitbart or Mr. Sundel. In fact, in view of the trial judge's opinion that Mr. Breitbart was not sufficiently familiar with Rhode Island practice, the trial justice might have "bent over backwards" to assist Mr. Breitbart as he had done during the pretrial motions. There is no suggestion of provocation in the transcript.

Further, the respondents contend that the passing of the case was necessitated by manifest necessity. The various Federal Courts have stated that the situations which may constitute manifest necessity are too numerous to catalogue. *United States v. Perez, supra; United States v. Jorn, supra; Dunkerly v. Hogan,* 559 F.2d 141 (2nd Cir., 1978). If this Court considers that the action of the trial justice was a *sua sponte* declaration of a mistrial, the removal of Mr. Breitbart was certainly manifest necessity. The trial justice clearly had the authority, pursuant to *United States v. Dinitz, supra,* to remove Mr. Breitbart for those reasons outlined by the trial justice. The exercise of the authority was proper.

As stated earlier, this case is controlled by *United States v. Dinitz, supra.* The action of the trial justice was not motivated by bad faith or done to harass or prejudice

the defendant. Mr. Sundel retained primary control over the course of trial to be followed. The course Mr. Sundel chose must lead him to a retrial. The charges should not be dismissed.

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CONCLUSION

The respondents request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

STATE

v.

William A. SUNDEL, and Frank W. Nelson.

No. 82-220-M.P.

Supreme Court of Rhode Island.
June 2, 1983.
Reargument Denied June 23, 1983.

The Superior Court, Kent County, Bourcier, J., denied defendants' motion to dismiss indictment on double jeopardy grounds, and common-law writ of certiorari was issued. The Supreme Court, Kelleher, J., held that: (1) where exchange between defendant's counsel and trial justice indicated that defendant's counsel was in full agreement that since codefendant was to obtain other counsel, defendant's motion to pass would be granted and defendant's counsel and his client would be back in courtroom on subsequent trial date ready for trial defendant's double jeopardy claim was propery rejected when his counsel appeared before trial justice on such date, and (2) record presented no reason to disturb trial justice's conclusion that, after having been given options, codefendant willingly opted for other counsel and subsequent trial and therefore subsequent prosecution was not barred by double jeopardy.

Petition denied; writ quashed; remanded.

1. Criminal Law—161

Constitutional guarantee against double jeopardy protects defendant in criminal proceeding against multiple

punishments on successive prosecutions for same offense. U.S.C.A. Const.Amend. 5.

2. Criminal Law—173

In jury trials, jeopardy attaches when jury is impaneled and sworn. U.S.C.A. Const.Amend. 5.

3. Criminal Law—183

When mistrial is granted on defendant's motion or with his consent, principle of double jeopardy does not bar subsequent prosecution. U.S.C.A. Const.Amend. 5.

4. Criminal Law—184

When trial is terminated over objection of defendant, such action must be justified by existence of manifest necessity; otherwise defendant's valued right to have trial completed by particular tribunal is violated. U.S.C.A. Const.Amend. 5.

5. Criminal Law—296

Where defense counsel's exchange with trial justice, after first witness had completed testimony and trial justice announced after recess that he was revoking pro hac vice status of codefendant's counsel, indicated that defendant's counsel was in full agreement that since codefendant was to obtain other counsel, defendant's motion to pass would be granted and defendant's counsel and his client would be back in courtroom on May 24 ready for trial, defendant's double jeopardy claim was properly rejected when his counsel appeared before trial justice on May 24. U.S.C.A. Const.Amend. 5.

6. Criminal Law—183

Retrial of defendant did not violate guarantee against double jeopardy, even though jury had been impanelled,

where the case had been passed at the earlier trial at defendant's request because defendant's out-of-state counsel was declared disqualified and defendant did not wish to continue the trial with codefendant's counsel. U.S.C.A. Const.Amend. 5.

Dennis J. Roberts II, Atty. Gen., Kenneth P. Madden, Asst. Atty. Gen., for plaintiff.

John A. O'Neill, Jr., James H. Leavey, Providence, for defendants.

OPINION

KELLEHER, Justice.

We have issued our common-law writ of certiorari to review the defendants' claim that a Superior Court justice erred when he denied their motion to dismiss an October 1981 two-count indictment that charged them with (1) conspiring to possess marijuana with an intent to deliver that substance and (2) possession of marijuana with an intent to deliver the same. The dismissal motion, which was based upon the constitutional guarantee against double jeopardy, can be better understood by a brief resume of the pertinent events that occurred in the Superior Court. Hereinafter we shall refer to the defendants, William A. Sundel and Frank W. Nelson, by their last names.

Once the two-count indictment was returned, John A. O'Neill, Jr., a member of the Rhode Island Bar, entered his appearance on behalf of both Sundel and Nelson. Subsequently, on November 2, 1981, David Breitbart, a member of the New York Bar, filed a motion in which he asked to be permitted to appear pro hac vice as trial counsel for

Sundel. The motion, which was endorsed by Sundel and Attorney O'Neill, was granted in early January, 1982.

The trial did not actually begin until March 31, 1982, when the jury-impanelling process began. Sundel's new counsel took an active role during the jury-selection process. There were occasions during the voir dire when the trial justice and Sundel's counsel expressed a difference of opinion on a variety of matters. Before the day was out, the jury was duly impaneled, and on the afternoon of April 1 both the prosecutor and Sundel's counsel gave opening statements to the jury. Sundel's counsel described the prosecution's main witness, Michael Hall, a named defendant, as a schemer, a liar, and an individual who from the first day he decided to go into the marijuana business knew that eventually he would be caught and schemed and planned to give somebody else to the police in the eventuality he was caught. He urged the jurors to scrutinize Hall's testimony closely so that they would not be fooled in the same way the State Police had been.

The prosecution's first witness was a State Police detective, Corporal Edward P. Malley. He described a search undertaken pursuant to a search warrant in August 1981 of a one-story commercial building situated in Warwick off Quaker Lane in an industrial park. According to the corporal, during their search the police discovered 218 bales of marijuana located in the bins of a business enterprise apparently doing business as Hot Tubs of Newport. During the cross-examination of this witness, numerous objections to questions posed by Sundel's counsel were sustained on a variety of grounds, including relevancy, hearsay, inquiries that went beyond the scope of the direct examination, and questions that sought responses

that were not within the personal knowledge of the witness. After Nelson's counsel, Mr. O'Neill, had finished his cross-examination, the witness was excused, and court recessed for the day.

Once the jury had left the courtroom, Sundel's counsel told the trial justice, "Your Honor, I have a due process application." He then spoke of a variety of matters, including his experiences as a trial attorney in New York and the lectures he had given at a law school relating to the law of evidence. In describing the trial justice's rulings on his cross-examination of Corporal Malley, Attorney Breitbart said, "I have never seen such a hypertechnical application in laying a foundation for my questions," and described the trial justice's rulings as a denial of due process.

After the trial justice had recounted his illustrious accomplishments at law school, Nelson's counsel entered the fray by saying he "would join in Mr. Breitbart's motion * * * and I would also add one of my own, Your Honor, [a] motion to pass and to sever for Your Honor's remarks * * *" after Mr. Breitbart had asked Corporal Malley how many arrests he had made during his thirteen years with the State Police.[1] The trial justice said that he would take the motions under advisement, and court adjourned for the day.

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[1]When the trial justice inquired about the relevancy of this inquiry, Mr. Breitbart referred to his opening statement to the jury in which he asked them "not to be fooled" by Hall's testimony "the way" "the most skilled interviewers in the State Police" were. Upon hearing his explanation, the trial justice sustained the prosecutor's objection with a comment, "Oh, my God."

When the court convened on the following day, April 2, the trial justice noted that he had before him at that moment the April 1 motions that were being pressed in behalf of Sundel and Nelson. At that point Mr. Breitbart explained to the trial justice that he never intended his April 1 "due process application" to be regarded as a motion to pass. The trial justice agreed that the record would indicate that Sundel's attorney had not filed a motion to pass but then went on to offer some critical comments on the attorney's conduct during the pretrial suppression hearing, the jury-selection process, and his cross-examination of Corporal Malley.

In essence, the trial justice was concerned whether matters had reached the point where Mr. Breitbart's effectiveness to represent Sundel had been diminished by his lack of knowledge of our rules of practice and procedure. His remarks also indicated that after court had adjourned on April 1, an in-chambers conference had taken place between the trial justice, the prosecutor, and both defense counsel. He also made it clear that if Sundel wished to continue with his present counsel, "I want him to be fully aware that he is doing so willingly and intelligently, and with full knowledge as to what appears to the court to be perfectly obvious in this case."

When counsel was asked whether he had conferred with Sundel concerning the options that had been discussed the previous day at the in-chambers conference, Mr. Breitbart answered in the affirmative. After an exchange of remarks, Mr. Breitbart asked for a "ten-minute" recess. When the court reconvened, the trial justice announced that Mr. Breitbart's permission to appear as pro hac vice counsel for Sundel had been revoked, and

Mr. O'Neill was then informed that he should confer with Sundel about whether there was any possibility of a conflict by a joint representation. Mr. O'Neill wasted little time in telling the trial justice that the conflict was real. Sundel was then asked if he desired to have other counsel, and his response was. "Yes, Your Honor." The trial justice in light of Sundel's request, passed the case for trial before another jury on May 24. He then granted the motion to pass that Nelson had filed on April 1.

On May 21, 1982, a hearing was held on a joint motion filed in behalf of Sundel and Nelson in which they asked for a dismissal of the indictment because of the bar of double jeopardy. The trial justice denied the motion, and in due course we stayed all the proceedings and issued our writ.

(1-4) The constitutional guarantee against double jeopardy protects a defendant in a criminal proceeding against multiple punishments or successive prosecutions for the same offense. *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). It is generally accepted that in jury trials jeopardy attaches when the jury is impaneled and sworn. *State v. Alexander,* 115 R.I. 491, 494, 348 A.2d 368, 370 (1975). Ordinarily, when a mistrial is granted on the defendant's motion or with his consent, the principle of double jeopardy does not bar a subsequent prosecution. *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *United States v. Dinitz,* 424 U.S. 600, 96 S.Ct., 1075, 47 L.Ed.2d 267 (1976); *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971). When a trial is terminated over the objection of the defendant, such action must be justified by the existence of a "manifest necessity"; otherwise, the de-

fendant's valued right to have his trial completed by a particular tribunal is violated. *State v. Berberian*, R.I., 411 A.2d 308, 310 (1980).

Both Nelson and Sundel, by counsel, complain about a lack of any manifest necessity that would have warranted the actions of the trial justice. Nelson also contends that he never asked for a retrial, and Sundel now describes the trial justice's "summary disqualification" of Mr. Breitbart as a denial of his constitutional right to retain an attorney of his own choice. The state responds to these contentions by asserting that each defendant asked for a mistrial; thus, there is no prohibition against their being tried a second time. We shall first discuss Nelson's claim and then go on to consider the contention made in behalf of Sundel.

As one may recall, on April 1, 1982, Corporal Malley had completed his testimony and the jury had left the courtroom when Mr. Breitbart informed the trial justice of the pendency of his due-process application. After Sundel had made an objection to what he considered a restrictive cross-examination, Mr. O'Neill, Nelson's counsel, announced that he would join in his colleague's motion or add one of his own, a motion to pass and sever, based on the trial justice's "Oh, my God" comment after Mr. Breitbart had explained the rationale of his inquiry into the career arrests made by Corporal Malley.

On the morning of April 2, the trial justice and Mr. Breitbart engaged in the extended discussion that ultimately led to the request for the ten-minute recess. Just before granting the recess, the trial justice acknowledged

the possibility that Sundel might seek other counsel but remarked,

> "I am trying to protect his rights and I am prepared, if he understands everything that I have said to him, to let this trial proceed and I will deny the motion of Mr. O'Neill based on our case law and we will proceed with this trial."[2]

(5) When the court reconvened after the recess, the trial justice announced that he was revoking Mr. Breitbart's pro hac vice status and that, in light of Sundel's request to seek counsel other than Mr. O'Neill, the case was being passed and assigned for trial to May 24, 1982. The trial justice then announced that, with regard to Nelson, the court "will grant his motion to pass this case and we will pass it to May 17 to be tried with the Sundel case."[3] At this point, Mr. O'Neill inquired, "May 24, isn't it, Your Honor?" and the trial justice said, "May 24, yes." This exchange indicates that Nelson's counsel was in full agreement that since Sundel was to obtain other counsel, Nelson's motion to pass would be granted and Mr. O'Neill and his client would be back in the courtroom on May 24 ready for trial. Consequently, Nelson's double-jeopardy claim was properly rejected when his counsel appeared before the trial justice on May 24.

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[2]The trial justice's denial was obviously aimed at Mr. O'Neill's joining in Mr. Breitbart's objection to the trial justice's "hypertechnical" restriction of his cross-examination of Corporal Malley.

[3]In taking this action, the trial justice was obviously referring to Mr. O'Neill's motion in regard to the trial justice's reference to the deity.

On May 21, 1982, the trial justice considered arguments both pro and con on the joint motion for a dismissal of the indictment. It is clear from a reading of the transcript of the dismissal hearing that the "ten-minute" recess called for by Mr. Breitbart on April 2 extended beyond ten minutes. The trial justice had before him at the May hearing three affidavits, each of which was prepared by one of the three trial attorneys, Mr. Breitbart, Mr. O'Neill, and Kenneth P. Madden, an assistant attorney general. Their affidavits indicate that a portion of the April 2 recess was spent by the attorneys conferring with the trial justice in his chambers.

Mr. Breitbart's affidavit states that the trial justice unjustifiably terminated the trial "on his own motion, sua sponte, without the voluntary acquiescence, either express or implied, of the defense." In his affidavit, Mr. O'Neill estimated that the recess lasted an hour and recollected that the trial justice announced that he was no longer going to allow Mr. Breitbart to continue as counsel. According to Mr. O'Neill, the trial justice told Mr. Breitbart that he had the option of terminating the proceedings by way of a motion to pass or or being removed from the case with Mr. O'Neill taking over as counsel for both defendants in the absence of any conflict.

The assistant attorney general averred that (1) Mr. Breitbart had informed all conferees that Sundel desired to engage other counsel; (2) the trial justice advised Mr. Breitbart of several options available to him concerning his status as trial counsel, including rescission of his permission to appear or withdrawal as trial counsel; and finally, (3) the withdrawal option was rejected and the trial

justice was asked to rescind Mr. Breitbart's pro hac vice status.

After examining the affidavits, the trial justice remarked, "Well, one thing is obvious. Everyone has different views of what went on." The trial justice estimated that the conference lasted about an hour when word came to him by way of the sheriff that the trial was not going to proceed because there was going to be a change of counsel. Upon receipt of this news, he summoned counsel into his chambers to see what was going on because he was ready to proceed to the next case. The trial justice then stated that Mr. Breitbart had told him, "You do what you have to do, on the other hand, I have to say what I have to say because I do not want it to appear that I am not adequately representing my client."

In his bench decision, the trial justice also disclosed that at the in-chambers conference he had assured Mr. Breitbart that the rescission of his pro hac vice status would not imperil the attorney's right to appear before other trial justices in this state because his ruling applied only to "his courtroom" and would remain in effect until such time as he was "satisfied" that Mr. Breitbart had become more familiar with the rules. When the trial justice inquired of Mr. O'Neill if he recalled this in-chambers conversation, Mr. O'Neill answered in the affirmative.

The trial justice also stated that Mr. Breitbart informed him that he had spoken with Sundel and that under all the circumstances Sundel believed that there should be other counsel in the case. Mr. O'Neill also agreed that this observation coincided with his recollection. Later, the trial justice also revealed that Mr. Breitbart had told him

that his post-recess objections were to be made solely for the purpose of protecting his reputation and had nothing to do with the passing of the case. Just prior to the actual denial of Sundel's motion to dismiss, the trial justice made it clear that, in his opinion, Sundel's request for a change of attorneys was a voluntary act on his part. Consequently, he denied Sundel's motion and refused to postpone the May 24 trial date.

(6) We were not present at the April 2 in-chambers discussion, but we cannot fault the trial justice's conclusions regarding what occurred during the extended ten-minute recess. However, we do know that Sundel cannot be considered a novice either in the narcotics business or in the give and take which goes on at the trial which usually follows after the police have shut down the business. Earlier, in *State v. Sundel,* 121 R.I. 638, 402 A.2d 585 (1979), we affirmed his convictions on two charges involving the illegal possession in his Newport home of cocaine and marijuana. The record regarding what happened in the courtroom just prior to the ten-minute recess clearly indicates that the trial justice had indeed expressed his willingness to continue the case with Mr. Breitbart as Sundel's counsel. It is also clear from the record that in the late afternoon of April 1 when the attorneys gathered with the trial justice for an in-chambers conference, Mr. Breitbart was admonished to explain the options available to Sundel; on the following day he assured the trial justice that the options had been explained to his client. Thus, we have no reason to disturb the trial justice's conclusion that, after having been given the options, Sundel willingly opted for other counsel and a subsequent trial. In light of this conclusion, Sundel's double-jeopardy claim must fall.

The petition for certiorari filed by both Sundel and Nelson is hereby denied, the writ previously issued is quashed, and the record in the case is remanded to the Superior Court with our decision endorsed thereon.